Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

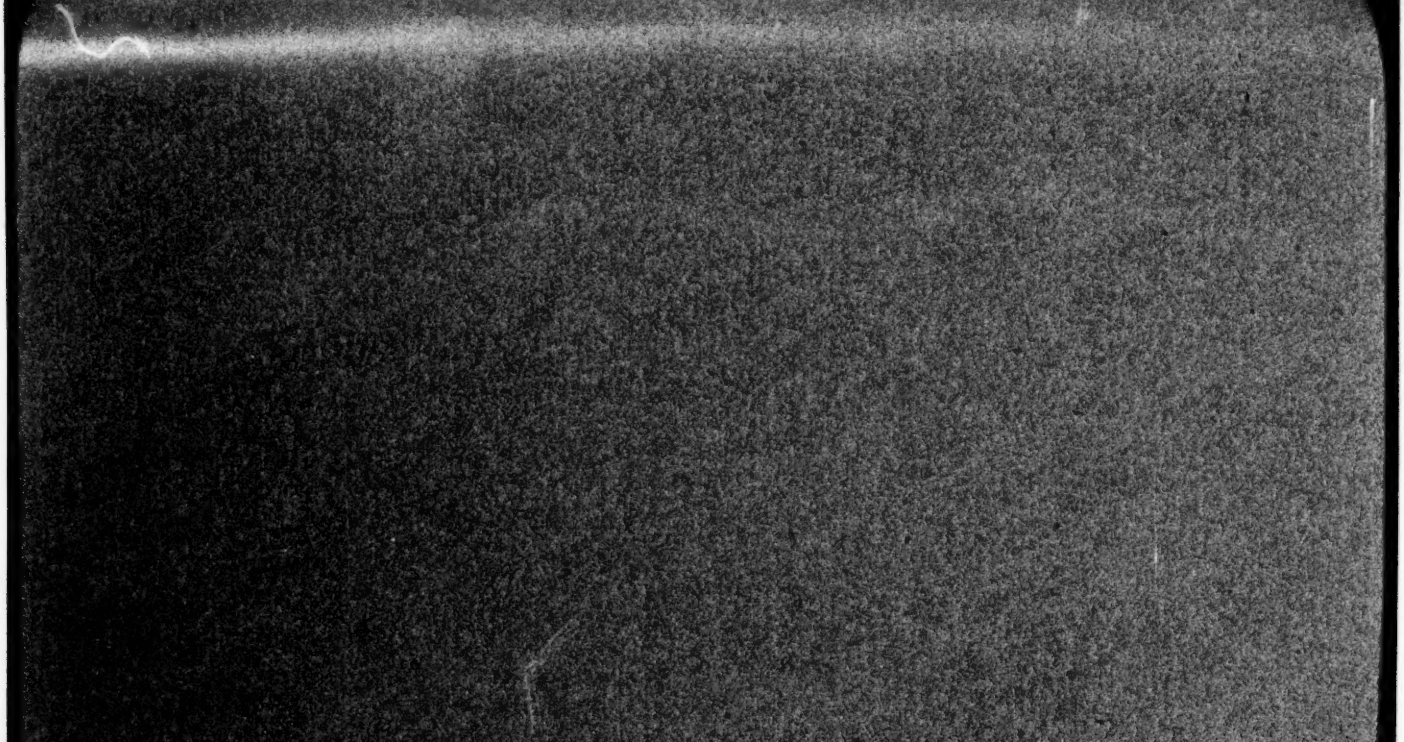
HARRY W. DICKERMAN, TRUSTEE, ET AL.,
Petitioners,

v.

THE NORTHERN TRUST COMPANY AND OVID B. JAMESON, TRUSTEES, AND COLUMBIA STRAW PAPER COMPANY,
Respondents.

Petition of Harry W. Dickerman, Trustee for the Second National Bank of Rockford, Illinois, Fred J. Diem, E. P. Hooker, Trustee for Merchants' National Bank of Defiance, Ohio, and in his own behalf and James C. Richardson, for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

OTTO GRESHAM,
Solicitor and of Counsel for Petitioners.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

HARRY W. DICKERMAN, TRUSTEE, ET AL.,
Petitioners.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals of the Seventh Circuit to certify to the Supreme Court for its review and determination a case of Harry W. Dickerman *et al.*, Petitioners, *v.* The Northern Trust Company and Ovid B. Jameson, Trustees, and Columbia Straw Paper Company, Respondents.

To the Honorable, the Supreme Court of the United States:

Your petitioners, Harry W. Dickerman, Trustee for the Second National Bank of Rockford, Illinois, Fred J. Diem, E. P. Hooker, Trustee for Merchants' National Bank of Defiance, Ohio, and in his own behalf, and James C. Richardson, respectfully show to this honorable court:

That the questions involved in the above cause are

questions of gravity and importance and for that reason the power of this honorable court can be properly invoked to require said cause to be certified. (*Ex parte Lau Ow Bew, Petitioner,* 141 U. S. 583.)

In this case, a decree for the foreclosure of a mortgage for $1,000,000 principal and $165,049 interest, and for the sale of the mortgaged premises, was entered by the Circuit Court and affirmed by the Circuit Court of Appeals, without any of the bonds representing such mortgage-debt, or any of the interest warrants representing such interest, having been produced before the Master or Court, or their absence accounted for, and without any stipulation or admission being contained in the mortgage or bonds or pleadings which would render such evidence unnecessary.

At a time when none of the bonds were due, either by their own terms or by the provisions of the mortgage, the trustees declared all of them due on the sole ground that a judgment before a justice of the peace for less than $200 had been taken against the mortgagor-corporation, and an execution immediately issued thereon, although the judgment was entered by arrangement between the officers of the mortgagor-corporation and the representatives of the trustees and bondholders, and although judgment was entered and execution sworn out after business hours on the very evening on which, a short time later, the whole million dollars of bonds was declared immediately due and payable.

The principal controversy arose over the defense, made by petitioners as stockholders of the mortgagor-company (allowed by the court to come in and defend against the foreclosure), wherein it was claimed by

petitioners that they and defendant company had been wronged by the bondholders, in this, that the former, as owners of various paper-mills, having sold the same and received part of the purchase-price in capital stock of a new corporation, organized by the bondholders, the latter had issued to themselves several million dollars of like capital stock of the new corporation, without paying any consideration therefor; and that it was inequitable for such bondholders, through the medium of a court of equity, to be allowed to sequester all the property of such new corporation for themselves, when they were indebted to that same corporation for unpaid stock, in an amount greater than the amount of their bonds.

It was for the evident purpose of escaping this inquiry that the bondholders and their trustees declined to produce the bonds in evidence.

The evidence in the case, even to the contents of the foreclosed mortgage, discloses without question that the new corporation was organized for the purpose of acquiring and owning all the straw-paper-mills in the Upper Mississippi Valley, embracing nine states, and that thirty-nine mills were acquired by it for the purpose of forming a monopoly in the manufacture and sale of straw paper throughout the United States, as the above region comprised about all the territory in the country in which such commodity was being manufactured.

Other minor grievances are complained of by petitioners, which arose during the progress of the cause in the Circuit Court, and which prevented petitioners from securing the aid of the court in raising issues and introducing evidence thereon. Amongst those was the action of the court in dismissing petition-

ers' cross bill on a mere motion, after the defendants had answered and replications had been filed.

It is submitted, that the statement of facts on page 13, *post*, supported by the record, will conclusively demonstrate that the above is a fair and indisputable statement of the controversies involved, and of the manner in which—as extraordinary as it may appear—the lower courts disposed of the same.

I.

The suit was brought in equity to foreclose a mortgage for one million dollars by the trustees named in the mortgage, The Northern Trust Company and Ovid B. Jameson. The mortgagor corporation, Columbia Straw Paper Company, was sole defendant.

Petitioners, as stockholders of defendant, were allowed to defend against the foreclosure because the mortgagee-bondholders were in control of the corporation, and were not making proper defense. Petitioners, in their answer, while admitting that the bonds secured by the mortgage had been, in fact, executed by the mortgagor-corporation, yet they expressly denied that such bonds were duly issued, negotiated and sold, or were outstanding and valid obligations of the defendant corporation.

The cause was referred to the Master, before whom none of the bonds (1,000 in number), nor any of the interest coupons, were produced in evidence, nor their absence accounted for.

Yet that officer found and reported to the court that all the bonds were negotiated and sold, and were outstanding and valid obligations of defendant corporation, and that they were secured by the mortgage sought to be foreclosed. He further found and re-

ported that there was interest due on the bonds, and unpaid (whether evidenced by interest coupons or not, he did not report), to the amount of $249,632.86.

For such principal and interest ($1,249,632.86), he recommended the foreclosure of the mortgage and sale of the mortgaged premises.

The circuit court overruled the exceptions of petitioners taken to the report of the Master in finding and reporting as above, and held, that the production of the bonds and interest coupons, in evidence, was not necessary until after the sale of the mortgaged premises, when the distribution of the proceeds of sale was about to be made.

That view was also taken by the Circuit Court of Appeals, which held (on the theory *ab inconvenienti*), that it would be impracticable to require all the evidence of mortgage-indebtedness to be presented in cases like the one at bar, before entering the decree of foreclosure and sale. (80 Fed. Rep. 450.) On page 455 the court say: Transcript 70

"In these cases where bonds issued by railroads or other large corporations on a large scale, and held in trust by trustees, but really owned by persons in many parts of the civilized world, it has not been the practice, nor would it be practicable to require the bonds to be produced before the court or Master before a decree *nisi* is entered. The practice has uniformly been to enter a decree of sale without the production of the bonds. Of course they can not be paid or share in the proceeds of sale until brought into court for payment and cancellation. In many cases years elapse after a decree is entered before all the bonds are brought in, the money lying in the registry of the court awaiting their presentation for payment, and in some cases all the bonds are never produced or paid. If the rule required all the bonds to be produced be-

fore the court or Master before a decree for sale could be made, it would in many cases be a practical denial of justice. No such practice has ever obtained to our knowledge. The sale is made for the benefit of all properly concerned. The decree is not final as to the persons or debts entitled to share in the proceeds. When the time for distribution arrives any creditor may challenge the title of the claimant of any bond presented."

It was urged upon both lower courts, on behalf of petitioners, that, admitting there was evidence before the Master which *prima facie* made a case of a mortgage duly executed, and sufficient mortgage indebtedness outstanding, and other facts to justify a decree of *foreclosure*, yet there ought not to be a *final decree* of sale until the cause should be again referred to the Master to ascertain and report the amount of the bonds and coupons outstanding. That in order to make such finding, the Master must have before him competent, legal evidence of such mortgage indebtedness, viz., the bonds and interest warrants, with the evidence of their respective owners or holders, as to the circumstances under which they came into their ownership or custody.

Petitioners insisted upon such proof, not to delay mortgagees or to throw legal obstacles in their way, but for the purpose of showing upon such examination that the owners and holders of the bonds and interest warrants had come by the same as part of the wrongful scheme to defraud the mortgagor-corporation and petitioners and other honest stockholders.

Their counsel before both courts, as well as before the Master, cited numerous cases where it had been held that, before a decree of foreclosure *and sale* could be ordered (*i. e.*, a final decree), it was indispensable that proof should be made of the amount of the mort-

gage-debt, even (in some cases) where a default had been taken against the mortgagor.

Their contention was there, as here, that it was not a question of what would be the more *convenient* practice, but of *substantive legal requirement;* that the mortgagor had a legal right, before its property should be sold to satisfy its mortgage indebtedness, to have that indebtedness judicially ascertained by legal proof.

Both the Circuit Court and the Circuit Court of Appeals seemed to regard the decree which was entered as a decree *nisi*, and that the *final decree* would not come until the property should be sold, its proceeds paid in and be ready for distribution amongst the mortgagee-bondholders, when the court should come to finally direct the disposition of the proceeds of sale.

But it was submitted for petitioners that this very decree was final as to the mortgagor-corporation; that before its property should be sold, the amount of its indebtedness, under the mortgage, should be ascertained by legal methods; so that if it should elect, it might pay the very amount thereof and prevent a sale; or, if a sale should be made, the amount necessary to be produced on such sale should be judicially ascertained. Because, from such sale, the defendant corporation could redeem in twelve months, by paying the amount of the sale with interest; and, for any deficiency, the defendant company would be liable to a judgment.

Counsel for petitioners urged upon the lower courts, as well as upon the Master, that for the Circuit Court to order a sale of the mortgage premises, before requiring legal evidence of the mortgage debt, with the purpose, as announced in the opinion of the learned Circuit Court of Appeals, of afterward requiring such evidence when the proceeds of the mortgage sale should be ready for distribution amongst the bondholders,

would be to postpone an indispensable legal requirement in disposing of the controversy between mortgagees and mortgagor until it would be *too late* to afford the latter any redress, in case the Master and the Circuit Court had *estimated* the mortgage debt at too great a sum; that in the foreclosure of a mortgage in equity, in addition to a judicial finding that the mortgage is a valid lien, it is also essential that the amount of the mortgage debt be ascertained; and that this must be done by legal evidence. In this case the mortgagor-corporation was decreed to be indebted for the full amount of the mortgage-debt, and to pay the same in ten days; in default of which the entire mortgaged premises were directed to be sold by the Master. Such a decree is certainly a final one, so far as the mortgagor is concerned. Whatever may be the result of any subsequent controversy between the bondholders over the distribution of the proceeds of sale can not concern the mortgagor, because it will not be a party to such controversy. Its indebtedness has been fixed; its property will have been sold to pay that indebtedness; and if, in the subsequent distribution of the proceeds of sale, it shall be found that the indebtedness was fixed at too great an amount, that discovery will come at too late a stage in the proceedings to give the mortgagor any relief.

That the above propositions are supported by the decisions, we refer the court to the following cases:

Dowden v. *Wilson*, 71 Ill. 485, 487–488.
Moore v. *Titman*, 35 Ill. 310.
Lucas v. *Harris*, 20 Ill. 166.
George, Admr., v. *Ludlow*, 66 Mich. 176.
Biers v. *Hawley*, 3 Conn. 110.
Field v. *Anderson*, 55 Ark. 546.
Schumpert v. *Dillard*, 55 Miss. 348, 363.

2 Jones on Mort., § 1469.

Shellaber v. *Robinson*, 97 U. S. 68. (Trust deed in equity is a mortgage.)

The learned Circuit Court of Appeals, it is submitted, was in error regarding the cases of *Guarantee Trust Co.* v. *Green Cove Springs and M. R. Co.* (139 U. S. 150) and *Toler* v. *Railway Co.* (67 Fed. 168).

In the former case this Court held that there was sufficient evidence before the court below to enable the plaintiff to maintain its bill, and that therefore it was error for that court to have dismissed the bill. This Court said: "Should the court proceed to a decree for "foreclosure and sale, the holders of the bonds can be "notified to appear and file them before the Master, and "all questions connected with their amount and owner-"ship can be settled upon *a final hearing.*"

In the case of *Toler* v. *Railway Co.*, *supra*, the distinction between a decree for foreclosure (in the nature of an interlocutory decree) and a decree for a foreclosure *and sale* (a final decree) is clearly pointed out. The court say (p. 181): "Should a decree of sale be "made absolute, the holders of bonds can then be re-"quired to produce their bonds and coupons before a "master, and all questions connected with the amount "due each, and of ownership, can then be determined." * * * "The decree for a foreclosure only establishes "that there has been a default in the payment of the "last three installments of interest." And the court thereupon directs a decree *nisi* to be drawn.

That the decree entered in this cause was, a final hearing of this cause, consummated by a final decree, see:

Forgay v. *Conrad*, 6 How. 201.

Railway Co. v. *Swasey*, 23 Wall. 405.

Grant v. *Insurance Co.*, 106 U. S. 429.
R. R. Co. v. *Soutter*, 2 Wall. 440.
Blossom v. *R. R. Co.*, 1 Wall. 655.
Hinckley v. *R. R. Co.*, 94 U. S. 467.
Ray v. *Law*, 3 Cranch 179.
Bronson v. *R. R. Co.*, 2 Black 524.
R. R. Co. v. *Fosdick*, 106 U. S. 47.
First National Bank v. *Shedd*, 121 U. S. 74.
Bostwick v. *Brinkirhoff*, 106 U. S. 3.

It is therefore respectfully submitted that this is the only case to be found in the books, of a decree for the foreclosure and sale of mortgaged premises being allowed to stand, where no evidence was introduced of the amount of the mortgage-debt by the production of the instruments representing the same, or their absence being accounted for, and where there was no waiver by the contract of the parties or by their stipulations in the pleadings.

II.

The respondents, in their bill of complaint, alleged that, "on or about the 22d of January, 1895, an exe- " cution was duly sued out against the chattels and " property of said defendant Columbia Straw Paper " Company, upon a judgment obtained against said " company, by James Flanagan, before George W. " Underwood, justice of the peace, Cook county, Illi- " nois, and the said defendant Columbia Straw Paper " Company has failed to remove, discharge or pay " such execution, although duly requested so to do." (Rec., p. 18.)

The transcript of the record of above mentioned judgment, introduced in evidence by respondents, shows

the suit commenced on January 22, 1895; summons issued returnable January 28, 1895; served upon the president of the defendant company at 5 o'clock P. M. of that day; the appearance of such president before the justice, and consent to go to immediate trial, and judgment for $180 and costs of suit, and immediate execution sworn out. (Rec., 275, 276.)

The execution came into the hands of the constable on the same day, at 5:24 o'clock P. M., and two months after was returned by that officer, "*nulla bona*"—without any levy being made, or any demand on the defendant in the execution for payment. (Rec., 277.)

Later on the same day, January 22, 1895, the following instrument was executed by respondents:

"CHICAGO, January 22, 1895.

"*To Columbia Straw Paper Company:*

"A judgment having been entered against you in "the court of George W. Underwood, justice of the "peace for Cook county, Illinois, on the 22d day of "January, 1895, in favor of James Flanagan, and "execution upon said judgment having been sued out "against your property, and you having failed to forth-"with remove, discharge or pay said execution, the "undersigned as trustee under the trust deed executed "by you to them under date of December 31, 1892, do "hereby declare the principal and all interest owing "upon the one thousand bonds named and described "in said trust deed to be immediately payable.

"(Signed)

"THE NORTHERN TRUST COMPANY.

"By BYRON L. SMITH, its *President.*

"Attest:

"ARTHUR HURTLY, *Secretary.*

"OVID B. JAMESON." } *Trustees.*

(Rec., p. 271.)

There was no evidence introduced that the above declaration was ever delivered to, or came to the

knowledge of, any of the officers or agents of the mortgagor-corporation.

On the evening of the same 22d day of January, 1895, respondents took possession of the property, including a large number of the paper mills of defendant mortgagor-corporation. (Rec., pp. 288 and 289.)

Two days later, on the 24th of January, 1895, respondents filed their printed bill of foreclosure in which they relied upon the above judgment, execution and declaration to foreshorten and make immediately due the whole $1,000,000 of bonds. (Rec., pp. 1, 18.)

In short, the record discloses that on account of an execution being issued by a justice of the peace for less than $200 after the close of business hours, the respondents, later in the same evening, declared due a mortgage indebtedness of $1,000,000, none of which was due, and a large part of which could not become due for many years, and that, standing upon such action, respondents, two days later, filed their bill to foreclose that mortgage, and have actually obtained their decree for a sale of the mortgaged property to pay the entire amount of the mortgage debt.

That such hot haste, under such peculiar circumstances, is not favored by the courts. See:

Union Mut. L. Ins. Co. v. *Union Mills Plaster Co.*, 37 Fed. 289.

Inman v. *West. Fire Ins. Co.*, 12 Wend. 452.

Bennett v. *Lyconing, etc., Ins. Co.*, 67 N. Y. 274, 276–277.

Noyes v. *Clark*, 7 Paige 170.

III.

The answer of your petitioners set up, as an equitable set-off to the amount that might be found due from

the mortgagor corporation to each bondholder on account of his bonds and coupons, an indebtedness owing by said bondholder to said mortgagor corporation on his subscription to the capital stock of the corporation *as an original subscriber*.

The facts alleged in the answer showed that the issue of the bonds and of all the capital stock of the corporation to your petitioners and others, in payment for the paper mill plants and to the bondholders, was one and the same transaction. That at the time the bonds were issued and paid for, the stock was issued to these petitioners who paid full value for it. That at the time of issuing the bonds, the company, by its board of directors, who were in the complete power of the bondholders, issued $2,113,000 of the capital stock to these bondholders, who took and now hold the same, all without any consideration therefor and without the knowledge, acquiescence or ratification of these petitioners, and other stockholders paying full value, and that the issue of such stock had been kept a secret from them.

The following is a correct statement of the facts in the case.

Statement of the Case.

1. This was a suit brought January 24, 189[illegible] the Circuit Court of the United States for the Nort[illegible] District of Illinois, to foreclose a trust deed dated December 31, 1892, securing an issue of 1,000 bonds of $1,000 each, aggregating $1,000,000. This trust deed was made to The Northern Trust Company and Ovid B. Jameson, Trustees, by the Columbia Straw Paper Company, a corporation incorporated under the laws of New Jersey. A receiver was appointed under this bill,

and ancillary proceedings were immediately begun in the United States Circuit Courts for the Southern District of Illinois, the Western District of Missouri, the Southern District of Wisconsin, the District of Michigan, the District of Indiana, the Southern District of Ohio, the Northern District of Ohio, the Southern District of Iowa and the District of Nebraska.

2. The petitioners are stockholders of the Columbia Straw Paper Company, and as such were permitted to become parties to the suit (Rec., p. 91) May 13, 1895, on showing that the Columbia Straw Paper Company was making no defense to the suit.

3. In 1890 a syndicate was organized for the purpose of acquiring all the straw paper mills in the United States, at that time seventy in number, the object being to form what is in commercial language termed "a trust." The panic of that year caused the scheme to be abandoned, and the options which had been secured on the mills lapsed. (Rec., p. 413.)

4. In 1892 this claim was revived headed by one Philo D. Beard, who became the president of the Columbia Straw Paper Company on its organization, and Samuel Untermyer of the law firm of Guggenheimer, Untermyer & Marshall, whose business was that of promoting enterprises involving large aggregations of capital. (Rec., p. 417.) After the organization of the mortgagor company the firm of Guggenheimer, Untermyer & Marshall became its general counsel in the city of New York, and they employed the firm of Dupee, Judah, Willard & Wolf to aid them in acquiring the mills referred to.

5. In order to get the mill owners into the combination, a form of option was prepared by Samuel Untermyer providing that a corporation was to be organized under the laws of New Jersey, with a capital of $4,000,-

000, divided into $1,000,000 of preferred stock and $3,000,000 of common stock; it also provided that the corporation might, if found necessary, issue bonds to the amount of $1,000,000. The options ran to Philo D. Beard and Thomas T. Ransdell, of Buffalo, New York, and provided that they should provide all the means necessary to finance the corporation to be organized. (Rec., p. 607.)

6. Options were secured on thirty-nine of the seventy mills, with their good-will, for $2,788,000, payable as follows: $766,000 in cash, $629,000 in preferred stock, $1,258,000 in common stock, and $135,000 in notes of the corporation to be organized.

7. October 14, 1892, Thomas T. Ransdell assigned his interest in the options, without any consideration, to Emanuel Stein, and afterwards Beard, without any consideration, assigned his interest in the option also to Stein (Rec., p. 372), and Stein, under the instructions of Beard and Untermyer, accepted the options. On December 6, 1892, the Columbia Straw Paper Company was organized under the laws of New Jersey, with a capital stock of $3,000,000 of common stock and $1,000,000 of preferred stock, with authority to issue bonds amounting to $1,000,000.

8. Immediately following the organization and prior to December 14, 1892, the incorporators elected as a board of directors the following persons: Philo D. Beard, William C. Heppenheimer, William C. Taylor, Maurice Untermyer, Moses Weimann, J. C. Guggenheimer, T. L. Herman, Harry C. Manheim, Samuel H. Guggenheimer (Rec., p. 192). Of these Maurice Untermyer and Moses Weimann were members of the firm of Guggenheimer & Untermyer; William C. Taylor, J. C. Guggenheimer, T. L. Herman, Harry C. Manheim and Samuel H. Guggenheimer were clerks in the office

of Guggenheimer & Untermyer; William C. Heppenheimer was a lawyer residing at Jersey City, in the state of New Jersey, as it was necessary under the laws of that state that there be at least *one* resident director.

9. On the 14th day of December, 1892, Emanuel Stein, who held the options for the benefit of the promoters, and who, to use his own language, "was the conduit" through whom they acted (Rec., p. ~~398~~), at their instance (Rec., p. 376), made a proposition in writing to the Columbia Straw Paper Company (Rec., p. 485) to transfer to it the thirty-nine mills, and received in payment therefor its entire capital stock, less a few shares issued to the incorporators, and the entire authorized issue of bonds of the defendant corporation. This proposition was drafted by Samuel Untermyer (Rec., p. 376), a copy will be found in the record at page 485. This proposition was accepted by the defendant company on the following day and was then embodied in the form of a contract between the corporation and Stein.

10. It was represented to the mill owners when they gave their options on their mills that the entire seventy mills were to be taken into the combination and pass into the hands of the corporation, as on the basis proposed in 1890 seventy mills would have required and absorbed the stock of the corporation of $4,000,000 (Rec., p. 418). An examination of the amounts named in the options show that the thirty-nine mills were to be acquired for and were actually acquired for $766,000 in cash, $1,887,000 payable in stock, leaving a surplus of $2,113,000 of stock.

11. Stein testifies, and he is nowhere contradicted, that prior to the transfer of the mills pursuant to the options, the promoters, Beard & Untermeyer, agreed that this $2,113,000 of stock should be issued and di-

vided amongst themselves (Rec., p. 393); that they would put up $1,000,000 on the bonds of the corporation and make the cash payment to the mill owners according to the options (Rec., p. 392). Samuel Untermyer collected the money from the parties who subscribed to the bonds and who held the same at the time this suit was instituted, and placed the same in his name in The Northern Trust Company in Chicago (Rec., pp. 388 and 577), in order to provide Stein with the funds necessary to meet the cash payments according to the options at the time the mill owners conveyed their property to Stein and wife, and Stein and wife conveyed to the Columbia Straw Paper Company, which were contemporaneous transactions.

12. The mill owners, including these petitioners, did not know that Untermyer, Beard and the other promoters were appropriating to this end $2,113,000 shares of the capital stock of the defendant company without paying therefor (Rec., p. 420). This fact did not become known to these petitioners until after the suit to foreclose the mortgage was instituted.

13. In order to make the combination originally contemplated by the acquisition of the seventy mills the officers of the Columbia Straw Paper Company soon afterwards organized, under the laws of New Jersey, a corporation known as the Paper Commission Company. The function of this corporation was to handle the straw paper manufactured by all the straw paper manufacturers in the United States, which acquired the right to handle the entire product of the Columbia Straw Paper Company and of the thirty-one mills which did not become the property of the Columbia Straw Paper Company (Rec., p. 437). Instead of purchasing these thir y-one mills with the $2,113,000 of stock as was originally contemplated, the promoters ar-

ranged through the scheme of the Paper Commission Company to control the product of these thirty-one mills and appropriate to their own use, without giving any consideration to the defendant company, this $2,113,000 of stock.

The court below (Rec., p. 70, 80 Fed. 453) says that "The main question is, whether there is any liability "on the part of the stockholders in defendant com- "pany which can be enforced in this proceeding, or "set up as a reason for defeating the foreclosure. We "are of opinion that these contentions made by the "defendants were properly overruled. The prime dif- "ficulty was in the lack of evidence to support the "allegations of the answer. There was no evidence "of any fraudulent overvalution, or of issuing stock "without consideration."

And the court further says (Rec., p. 72, 80 Fed. 454), "The suit is not prosecuted on behalf of creditors, "and there is therefore no question here of the lia- "bility of stockholders."

With due and becoming deference to the opinion of the Circuit Court of Appeals we submit that the record does show, clearly and without contradiction, that the bondholders, represented by Untermyer & Wolf, first suggested the idea of consolidation of the mills in 1892 to the mill owners. The letter of Untermyer (Rec., p. 511), the option contract (Rec., p. 604), the testimony of Stein (Rec., p. 371) and of Sherwood (Rec., p. 414) all show it. The option-contract and Sherwood's testimony (Rec., p. 415) showed that it was agreed between petitioners and the bondholders represented by Stein, that *all* the stock was to be used in buying all the seventy milling plants instead of only thirty-nine. The testimony of Stein and the

exhibits show that $2,113,000 of stock was handed over to the bondholders as a gratuity. The option-contracts show that they were obtained for the benefit of the new company to be organized, and not for the benefit of Beard, Ransdell or Stein or the bondholders and that no more was to be paid for the mills than the option called for. Ransdell's sworn answer (Rec., p. 253) states this positively. Stein, Wolf, Beard, the bondholders and the board of directors all knew that the transfer to Stein and from Stein to the company was unnecessary and unexpected under the option contracts, and the only necessity of it was to get from the treasury of the company into the pockets of the bondholders *by form of legal contract* this surplus stock of $2,113,000 without any consideration; whereas, under the original agreement with the petitioners it was to be used in purchase of those thirty-one mills that were not purchased as agreed with the promoting bondholders, but which were afterwards tied up in consolidation with defendant company by means of what is known as the Paper Commission Company (Rec., p. 438).

By accepting this original issue of stock, each bondholder is liable for the full amount of the same. It is not necessary that there be an express subscription.

Webster v. *Upton*, 91 U. S. 65.

Upton v. *Tribilcock*, 91 U. S. 44.

This is the rule in reference to an original issue, although it is different in the purchase of stock in the open market, on a "going concern."

The act of the board of directors, in issuing this $2,113,000 not having been assented to, acquiesced in or ratified by the petitioners, the latter in equity, under

the averments of their answer, have the right to compel each bondholder to allow his indebtedness to be set off as against the indebtedness on his bond and coupons.

Cook on Stockholders, section 701 (3d edition).

The transaction concerning this original issue of the $2,113,000 of the stock to the bondholders, without consideration, under an agreement made in advance of the organization of mortgagor corporation, and carried out after organization by an abuse of fiduciary relations to that company, amounts to this:

The bondholders subscribed for $2,113,000 of original issue of stock, and instead of payment therefor, secured an agreement from the directors, *under their complete control*, that the company, for $1,000,000 advanced on their subscriptions, would give them a mortgage on the whole plant of the company, whereby the company was to pay back to them the money they advanced on their subscriptions.

See *Morrow* v. *Iron and Steel Co.*, 87 Tenn. 262.

Sawyer v. *Hoag*, 17 Wall. 610.

The mortgagor-corporation could not give away its stock as against non-assenting stockholders, any more than as against creditors.

Cook Stockholders (3d ed.), § 41.

Morawetz on Priv. Corp., §§ 270, 286, 288.

At § 286, Mr. Morawetz tersely states the rule: "Every shareholder in a corporation is entitled to in- "sist that every other shareholder shall contribute his "ratable part of the company's capital for the common "benefit." * * * * "It would be a plain viola-

"tion of the equitable rights of those shareholders who "have contributed the amount of their shares in full, "to allow any persons to have the benefits of member- "ship, without adding the amounts of their shares to "the company's capital."

The circuit court should have refused to foreclose the mortgage for the bondholders, until they had paid the mortgagor-company the amount of their unpaid stock subscriptions.

IV.

After the taking of testimony before the Master, the respondents filed an amendment to their answer on February 9th, 1896. The amendment is in full in the Record, pp. 316 to 322. On March 4th the court refused to allow the amendment to be made (Rec., p. 325). The purpose of the amendment was to conform the pleadings to the proof, and to set up as a defense to the bill the fact that the execution of the bonds and mortgage was a part and parcel of a scheme to form an illegal combination in restraint of trade, commonly known as a trust.

The circuit court, sitting as a court of equity, as soon as the contents of the amendment was made known should have, *sua sponte*, allowed it to be filed. Courts of equity ought not to, and will not, enforce illegal contracts, but will leave the guilty parties where they find them. A good illustration is the case of *Richardson* v. *Buhl*, 77 Mich. 632, where the court acted voluntarily, as soon as it learned the contract under consideration was made in pursuance of the formation of a "trust."

That the defendant-company, Columbia Straw Paper Company, was an illegal combination is shown by

(1) Letter of Untermyer to Wolf (Rec., p. 511).

(2) Sworn answer of Ransdell (Rec., p. 252).

(3) Recitals in mortgage, "Exhibit A," to bill (Rec., pp. 24 and 27).

(4) Stein's proposition to board of directors (Rec., p. 485).

(5) Agreement between Stein and Company (Rec., p. 489).

(6) Paper Commission Company (Rec., p. 495) formed to take in balance of mills (Rec., p. 507).

(7) Sherwood and Stein's testimony (*passim*).

Even if the court would not admit the amendment, *sua sponte*, it ought to have done so ~~over objection of complaints~~ on the motion of the defending stockholders.

C., M. & St. P. Ry. Co. v. *Third National Bank of Chicago*, 134 U. S. 276, pp. 288 and 289.

Starr and Curtis' Illinois Statutes, 1896, p. 1252.

Acts of Illinois, 1891, p. 206, section 5.

Acts of Illinois, 1893, p. 182, section 8.

U. S. Statutes at Large, 1890, p. —.

V.

The cross-bill was filed under leave of court granted upon a petition (Rec., p. 105) prepared according to the 94th equity rule. It asked affirmative relief, not for violation of any personal equitable rights of your petitioners (as was the case of *Forbes* v. *R. R. Co.*, 2 Woods 323, Fed. Cases No. 4926, cited as authority by the court below), but for and in behalf of the defendant company, mortgagor, whose board of directors was under the control of the bondholders, represented by the respondent trustees, and which company had filed an answer denying nothing in the bill.

The cross-bill was filed May 18, 1895 (Rec., p. 122), and the respondent trustees, the defendant company mortgagor, and certain of the bondholders, who were original promoters of the company, were made parties defendant. (*Braden* v. *Prime*, 14 Blatchf. 371, Fed. Case No. 1810.)

The respondent trustees, complainants, answered, as did almost all the defendants. (Rec., pp. 159 to 200 and 211 to 257.) Replications were filed by your petitioners to each of the answers. (Rec., p. 201 to 205 and 257 to 263), the last being filed on September 16, 1895.

January 13, 1896, the Circuit Court sustained the motion of complainants to strike the cross-bill from the files. (Rec., p. 314.)

The court below, as we understand from its opinion, bases its action in sustaining the Circuit Court in striking the cross-bills from the files on the following propositions:

(*a*) That your petitioners were defendants only by the permission and order of court. (80 Fed. 456.)

(*b*) That the matters set up in the cross-bill were substantially those set up in the answer, and, therefore, there was no need of a cross-bill. (80 Fed. 457.)

(*c*) That the rule regarding the filing of cross-bills by permission is different from the rule in regard to filing original bills, which can not be dismissed on motion. (80 Fed. 457.)

(*d*) That matters in cross-bill were not germane to matters in original bill. (80 Fed. 457 and 458.)

We first submit that, no matter under what circumstances a cross-bill is allowed to be filed in a cause, if once filed, an answer filed to it, then the cross-defendant has waived whatever right he may have had to move to strike it from the files. *A fortiori*, where replication is filed, and the cause at issue.

Payne v. *Cowan*, 1 Swed. & M. Chan. (Miss.) 35.

Glegg v. *Leigh*, 4 Madd. 191.

Betts v. *Lewis*, 19 How. 72.

(*a*) That your petitioners were made defendants only by permission of the court, and the cross-bill was filed under leave.

The court below justifies its action in sustaining the Circuit Court in dismissing the cross-bill on the decision in *Forbes* v. *Railroad Co.*, 2 Woods 323, Fed. Cas. § 4926.

But there is a wide distinction between these causes. In the Forbes case, the defendants filing cross-bills were seeking affirmative relief on behalf of their own private interests and not on behalf of the corporation. It was their individual equitable rights, and not those of the corporation, which were claimed to be invaded. The motion to dismiss went to the action of the court in allowing them to be made parties at all. In this cause, the matters set up in the petition and alleged in the cross-bill, which was verified by oath, were set up under the provisions of Equity Rule 94. The cross-bill is "founded on a right which may properly be asserted by the corporation." The averments of the cross-bill, with reference to the refusal of the company to assert its rights, were material averments. If insufficient in equity, the question could be raised by demurrer and

not by motion to dismiss. When answers were filed, a hearing was the only method of ascertaining their truth. By peremptorily dismissing the cross-bill, as the court did, the corporation has been caused to lose all equitable rights it may have on behalf of its innocent and minority stockholders, which was being urged by this cross-bill against the bondholders represented by the trustees. As is said in *Bronson* v. *L. & M. R. R. Co.*, 2 Wall. 283, which was decided prior to the promulgation of Rule 94 in Equity. "It would be a reproach to the "law, and especially in a court of equity, if the stock-"holders were remediless."

Another distinction between this cause and the Forbes case, *supra*, is that, in that case the defendants having made a *prima facie* case, they were allowed to defend. But *before* filing cross-bill, a rule was entered against them to show cause why the order permitting them to defend should not be vacated. A hearing was had, and on that hearing the court vacated the order, and expressly did so because there was much doubt whether the defendants were *bona fide* stockholders; that their contention was in behalf of their individual interests, and were *in opposition* to the interests of the company, and they admitted the truth of all the charges of gross fraud on the part of the board of directors of the company *of whom they were a part*.

In this case there is no dispute as to your petitioners being *bona fide* stockholders, nor of their asserting rights on behalf of the company, which is expressly stated to be under the control of the bondholders. Further, in this case a cross-bill has been filed. The action of the court in the Forbes case was the vacating of the order allowing the intervention for good cause shown. In this case the order allowing the intervention is not attacked, but allowed to stand, and the answer of

the intervenors is allowed to remain in and a hearing has been had and decree rendered on the same. Your petitioners are held rightly to be in court, and their answer recognized, but they are deprived of the benefit of their cross-bill on grounds which could only apply to vacating an order for good cause allowing them to intervene.

(*b*) That the matters set up in the cross-bill were substantially those set up in the answer, and therefore there was no need of a cross-bill.

We submit that the court below in its decision has failed to recognize that in equity a cross-bill may serve for two very different purposes. Affirmative relief in equity is not granted on an answer. It is granted only on a cross-bill. A cross-bill may be used for defense merely, or it may be used to obtain affirmative relief. In *Lautz* v. *Gordon*, 28 Fed. 264, the court recognized this distinction by pointing out that, when used as a defense, it may set up a legal as well as an equitable defense, whereas when used to obtain affirmative relief, it must set up facts calling for equitable relief only. In the latter case "the cross-bill is of the nature "of an original bill seeking further aid from the "court."

We believe the court below to be in error in stating that the answer and cross-bill set up substantially the same facts. The cross-bill contains additional facts to those set up in the answer.

The court is also in error, in stating as applied to this cause, that upon the filing of two answers setting up the same matter, one would be struck out on motion, and that the labeling of one of them as a cross-bill would not change the rule. The sentence does not

express the true statement of facts here. It would be better expressed by saying if two pleadings are filed containing exactly the same matter, and in one of which it clearly appeared that it was filed as a defense to the bill, and in bar of the suit; and in the other it clearly appeared that it was filed for the purpose of obtaining equitable *affirmative* relief; the former would be allowed to stand as an answer, the latter, as a cross-bill.

The cross-bill in this cause set up facts, and on those facts asked for an accounting in equity between the defendant company and the bondholders, represented by the respondents, on account of transactions between them and the company at the time of, and in connection with, the execution of the bond and mortgage. Under the answer, this equitable affirmative relief could not be granted.

Under Equity Rule 90, affirmative relief must be sought by cross-bill, as in the English High Court of Chancery.

White v. *Bower*, 48 Fed. 187, citing
Noonan v. *Lee*, 2 Black 499–509;
2 Dan'l Chancery Prac. 1547;
R. R. Co. v. *Bradley*, 10 Wall. 299.

In *Kingsbury* v. *Buckner*, 134 U. S. 650, a quotation is made from *Jones* v. *Smith*, 14 Ill. 229: "No fitter "case could be imagined for a cross-bill than the one "which is presented by these pleadings. No doubt "upon his answer, he (defendant) was at liberty to "prove the facts averred, but this would only defeat "Smith's (the plaintiff's) claim for relief; while the "*same facts, if established upon a cross-bill*, would en-"title him to have satisfaction of the judgment actually "entered."

(*c*) That the rule regarding the filing of cross-bills by permission is different from the rule in regard to filing original bills, which can not be dismissed on motion.

We respectfully submit to this honorable court that there is no logic or reason why the rule should be different. A cross-bill is in substance an original bill filed by the defendant in the cause to obtain affirmative relief, and also to bring before the court, completely, "the whole matter in dispute." Dan'l Chancery Pr. 1547.

If the permission is once given by the court to be made a defendant in the cause, it follows by all the rules of logic and reason, that he should be allowed, as a defendant, to assert all his equitable rights, and to obtain all his equitable remedies. On what ground can he be considered in court to file an answer, but out of court when he attempts to file a cross-bill? The case of *Forbes* v. *R. R. Co.*, *supra*, quoted from by the court below, does not hold any such doctrine. The court did not there enunciate the remarkable rule of practice in equity, that the court would allow the petitioner to become a defendant, recognize him as such, allow his answer to stand, and refuse to strike it out as the court below did in this case (Rec., p. 325), but dismiss the cross-bill for no other reason than that the rule is different as to original and cross-bills.

We submit that the rule is not different. That when a stranger to the original suit is once allowed to become a defendant, and files a cross-bill for affirmative equitable relief, then the rule is that his cross-bill must be tested by demurrer, or, if answered, shall go to a hearing, and that there is no more reason why a cross-bill should be dismissed than should an original bill.

(*d*) That matters in cross-bill were not germane to the original bill.

Webster defines "germane" to literally mean—near akin; and as a derivative meaning—closely allied—appropriate or fitting—relevant.

The court below says that the original bill is simply to foreclose a mortgage, and therefore the cross-bill is not germane. But this was the *object* only of the bill. The cross-bill was germane to the *subject*-matter of the original bill, which is the execution of the mortgage and bonds for the purchase-money of the milling plants, the validity of the same, the indebtednes of the company to each holder of the bonds, and the nonpayment and the resulting right of foreclosure. The cross-bill sets up an equitable set-off against each holder of the bond, and asks for an accounting. The case of the *Investment Corp.* v. *Marquan*, 62 Fed. 960, cited by the court below, does not apply, because in that case the alleged cross-bill was filed for defense merely, and in no sense asked for either discovery or affirmative relief, and in fact was not a cross-bill, and, not being such, was dismissed. But on the question of whether the cross-bill was germane or not to the original bill, we submit that it could not be dismissed. On that point it could only be struck down by a demurrer, or fail on the hearing.

Admitting, *arguendo*, that the circuit court could dismiss the cross-bill, without demurrer filed, or allowing it to go to a hearing, and after issues closed, on the sole ground that its contents are not germane to the subject-matter of the original bill, we submit that in this cause the subject-matter of the cross-bill is "closely allied, appropriate, fitting and relevant" to the subject-matter of the original bill.

The original bill sets out the execution of the bonds and trust deed, their validity, the indebtedness of the company to the bondholders, that the same is due and unpaid.

The cross-bill sets out that, in and by the same transaction which the indebtedness of the company on the bonds was created, the indebtedness of each bondholder on his stock subscription was created; that if the indebtedness of the company on the bonds is valid, the indebtedness of each bondholder on his stock subscription is valid; that if the indebtedness on the bonds is due and unpaid, so is the indebtedness on the stock subscription; that your petitioners, the cross-complainants, became stockholders at the same time with the bondholders, and by virtue of the same mutual agreement to organize the company; that they had no knowledge of, nor have they ratified or acquiesced in the action of the bondholders in taking their $2,113,000 of stock without any payment therefor. The cross-bill asks for an accounting as to each bondholder, who is the real party in interest, although represented by the mortgage trustees, and that the *company* shall have the affirmative relief of a decree against each bondholder for such amount as shall be found due over and above the amount due on each bond. The debts are shown to be mutual, and to grow out of the same transaction. It is a pure specimen of equitable set-off, which should be allowed.

That your petitioners can obtain such relief in this foreclosure suit seems clear, under

Equity Rule 94.

Bayless v. *Ry. Co.*, 8 Bissell 193.

Thomas v. *R. R. Co.*, 101 U. S. 71.

Thomas, Trustee, v. *Ry. Co.*, 109 U. S. 552.

Morawetz on Corp., section 306. Citing authorities.

Set-off is enforceable in equity where there are mutual debits and mutual credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow set-off.

Gray v. *Rollo*, 18 Wall. 629.
Wanzer v. *Truly*, 17 How. 584.

The case of *Patterson* v. *Linde*, 106 U. S. 519, arose where stockholders of a corporation organized under a statute of Oregon had not paid their subscriptions in full.

The statute of Oregon is almost identical with the statute of New Jersey, under which the defendant company was incorporated. In that case, on page 521, this Court says, after holding that the suit should be in equity by the corporation against all the stockholders for the benefit of all the creditors:

"The liability of the stockholder to the creditor is "through the corporation, not direct. There is no "privity of contract between them, and the creditor "has not been given, either by the constitution or the "statute, any new remedy for the enforcement of his "rights. The stockholder is liable to the extent that "the subscription represented by his stock requires him "to contribute to the corporate funds, and when sued "for the money he owes, it must be in a way to put "what he pays, directly or indirectly, into the treasury "of the corporation for distribution according to law."

Beard, Untermyer, and others, bondholders, through respondents, call on the company in this suit for the debt represented by the mortgage, and in lieu thereof, ask for a foreclosure. The company can, in a suit in equity, call on Beard, Untermyer and others for their debt on the stock subscriptions. The debts and credits

are therefore mutual, and instead of the company bringing an independent suit against the stockholders, there should be set-off in this suit.

Wherefore your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this court, on a day certain, to be therein designated, a full, true and complete transcript of the record, and of all proceedings of the said Circuit Court of Appeals in the said cause therein, entitled Harry W. Dickerman, Trustee, et al. *v.* The Northern Trust Company, and Ovid B. Jameson, Trustees, and Columbia Straw Paper Company, No. 344, to the end that said cause may be reviewed and determined by this court, as provided in section 6 of the act of congress, entitled "An act to establish circuit "courts of appeals, and to define and to regulate, "in certain cases, the jurisdiction of the courts of the "United States, and for other purposes," approved March 3, 1891, and that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray, etc.

Otto Gresham

Solicitor for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1897.

Messrs. Dupee, Judah, Willard & Wolf, Solicitors for the Northern Trust Company and Ovid B. Jameson, Trustees:

In the suit mentioned in the annexed and foregoing petition you will take notice that on Monday, the 29th day of November, 1897, at the opening of Court, or as soon thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for its decision thereon.

OTTO GRESHAM,
Solicitor for Harry W. Dickerman et al., Petitioners.

Service of a copy of the foregoing notice and of the petition for a writ of *certiorari* annexed thereto, is hereby acknowledged this 6th day of November, 1897. Said 29th day of November, 1897, for its submission to the Supreme Court is agreeable to us.

Charles A. Dupee
Mower S. Willard
Solicitors for the Northern Trust Company and Ovid B. Jameson, Trustees.